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In The

Supreme Court of the United States

October Term, 1991

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, IDAHO, INDIANA, MISSOURI, NEVADA, OKLAHOMA, OREGON, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE STATES OF ALABAMA, ALASKA, IDAHO, INDIANA, MISSOURI, NEVADA, OKLAHOMA, OREGON, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

The States of Alabama, Alaska, Idaho, Indiana, Missouri, Nevada, Oklahoma, Oregon, and Wyoming, as Amici Curiae, and pursuant to this Court's Rule 37.5, file this Brief in Support of the Petition for Certiorari filed by the Director of the Department of Land and Natural Resources, State of Hawaii.

INTEREST OF THE AMICI CURIAE

The Amici States have an abiding interest in this case arising out of their concern that the United States Court of Appeals for the Ninth Circuit, in a series of recent cases,[1] has unduly expanded the reach of the federal courts' Article III power, and of the Civil Rights Act of 1871, 42 U.S.C. § 1983, in holding that private individuals may sue in federal court to redress what they consider to be violations of various restrictions placed on state lands, conveyed to the State of Hawaii upon admission to the Union, by the Hawaii Admission Act.

While each State's admission or enabling act has a unique history, many of these founding documents contain language that is similar to that relied upon by the Court of Appeals in this case to generate federal "rights" enforceable in private suits under 42 U.S.C. § 1983. In the Ninth Circuit alone, for example, public land trust provisions are set forth in the admissions acts of at least seven

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[1] *See, e.g., Keaukaha Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984); *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985) (dictum), *cert. denied*, 474 U.S. 1055 (1986); *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990) (dictum); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991), *pet. for cert. filed*, No. 90-1941 (U.S. filed June 19, 1991); *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), *pet. for cert. filed*, No. 90-1937 (U.S. filed June 18, 1991); *see also Price v. State of Hawaii*, No. 90-15117 (9th Cir. July 11, 1991), *as amended* (9th Cir. Aug. 8, 1991). As pointed out by the petition, this case, along with that in No. 90-1941, are the first in which the Ninth Circuit, except in dictum, has expanded the enforceability of § 5(f) of Hawaii's Admission Act beyond cases involving only the Hawaiian Home Lands governed by the more particularized requirements of § 4 of the Hawaii Act.

States, in addition to Hawaii. These provisions state variously that certain public lands are to be granted "for the support of the public schools," *see* § 6(f) of the Alaska Admission Act, 72 Stat. 339, 341 (1958), or "for the support of common schools," *see* §§ 24, 28, of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 572 (1910); § 4 of the Idaho Admission Act, 26 Stat. 215 (1890); §§ 10-13 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. 676, 679-80 (1889); § 7 of the Nevada Enabling Act, 13 Stat. 30, 32 (1864); or "for the use of schools," *see* § 4 of the Oregon Admission Act, 11 Stat. 383 (1859). The Acts also provide lands for various other public purposes.[2] The admission acts of States

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[2] *See, e.g.*, § 6(a) of the Alaska Admission Act, 72 Stat. at 340 (lands "[f]or the purposes of furthering the development of and expansion of communities"); § 25 of the Arizona-New Mexico Enabling Act, 36 Stat. at 573 (lands for "university purposes" "penitentiaries," "insane asylums," "school and asylums for the deaf, dumb, and the blind," "miners' hospitals," "normal schools," "state charitable, penal, and reformatory institutions," and "agricultural and mechanical colleges"); §§ 10 and 11 of the Idaho Admission Act, 26 Stat. at 216 (lands for "an agricultural college," "a scientific school," "normal schools," "the insane-asylum located at Blackfoot," "the State University at Moscow," "the penitentiary located at Boise City," "other State, charitable, educational, penal, and reformatory institutions"); §§ 14 and 17 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. at 680-81 ("university purposes," "school of mines," "normal schools," "agricultural colleges," "reform school," "deaf and dumb asylum," and "charitable, educational, penal, and reformatory institutions"); §§ 9, 10 of the Nevada Enabling Act, 13 Stat. at 32 ("a penitentiary or state prison," and "public roads, constructing ditches or canals, to effect a general system of irrigation of the agricultural land in the state").

outside of the Ninth Circuit admitted after the formation of the Union also make grants of lands for certain purposes.[3]

The decision of the court below in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), authorizes any private citizen who invokes 42 U.S.C. § 1983 to sue the officers of the State of Hawaii in federal court for a determination whether particular lands, which the private parties do not own and do not claim any specific part of, fall within the corpus of "trust" lands conveyed to Hawaii on its admission to the Union, and, if so, for an "appropriate remedy" if Hawaii's officials have improperly granted those lands to private parties. The Amici States are gravely concerned that the failure by this Court to reverse the judgment of

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[3] *See* § 7 of the Ohio Admission Act, 2 Stat. 173, 175 (1802); § 6 of the Indiana Enabling Act, 3 Stat. 289, 390-91 (1816); § 5 of the Mississippi Enabling Act, 3 Stat 346, 347 (1817); § 6 of the Illinois Enabling Act, 3 Stat. 428, 430-31 (1818); §§ 6-7 of the Alabama Enabling Act, 3 Stat. 489, 491 (1819); § 5 of the Missouri Enabling Act, 3 Stat. 545, 547 (1821); §§ 1-4 of the Act to Supplement the Arkansas Admission Act, 5 Stat. 58 (1836); § 6 of the Act to Supplement the Iowa and Florida Admission Act, 5 Stat. 789 (1845); § 2 of the Joint Resolution for annexing Texas to the United States, 9 Stat. 797-98 (1845); § 7 of the Wisconsin Enabling Act, 9 Stat. 56, 58 (1846); § 2 of the Wisconsin Admission Act, 9 Stat. 233 (1848); § 5 of the Minnesota Enabling Act, 11 Stat. 166-67 (1857); § 3 of the Kansas Admission Act, 12 Stat. 126-27 (1861); § 7 of the Nebraska Enabling Act, 13 Stat. 47, 49 (1864); § 7 of the Colorado Enabling Act, 18 Stat. 474, 475 (1875); §§ 4-11 of the Wyoming Admission Act, 26 Stat. 222, 223-24 (1890); §§ 6-12 of the Utah Enabling Act, 29 Stat. 107, 109 (1894); §§ 7, 8, and 34 of the Oklahoma Enabling Act, 34 Stat. 267, 272, 273, 283 (1906); §§ 7-10 of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 562-65 (1910).

the Court of Appeals could lead other panels within the Ninth Circuit to expand the reach of § 1983 to similar suits against other States, based on their admission or enabling acts, and could encourage the remaining courts of appeals to extend § 1983 in a similar way vis a vis the States within their purview.

The Amici States are concerned that the Ninth Circuit has fundamentally misunderstood the reach of Article III and § 1983 on at least three major fronts. First, given that the private Respondent in this case, like the citizens of those States with analogous restrictive conditions in their Admission and Enabling Acts, has no specific entitlement to any distribution of public trust land, Respondent lacks Article III remedial standing to invoke the jurisdiction of the federal courts on the equitable claims which he seeks to litigate in this case. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976). Indeed, four Justices have already expressed their views that Article III standing is lacking in just such suits. *ASARCO, Inc. v. Kadish,* 490 U.S. 605, 614 (1989) (Kennedy, J., joined by Rehnquist, C.J., Stevens, and Scalia, JJ.).

Second, irrespective of whether other grounds would oust "breach of trust" suits in federal court, the judgment below raises serious concerns under the Eleventh Amendment. While it would appear that, in light of this Court's decision in *Papasan v. Allain,* 478 U.S. 265 (1986), and related Eleventh Amendment principles, sovereign immunity would foreclose any remedy, the Ninth Circuit has opened the door to federal suits for "breach of trust" regarding lands conveyed on admission to the Union. The

Amici States have serious concerns over such a development, and for this additional reason ask that certiorari be granted.

Third, the Ninth Circuit has fundamentally misapplied this Court's doctrines that permit federal statutes to be enforced in limited circumstances under 42 U.S.C. § 1983. Particularly where, as here, it is dubious whether Respondent's claim that the Hawaii director has improperly managed state land "arises under" federal law in any sense, *see Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814-15 & n.12 (1986), the decision below inverts this Court's commitment to the defense of State prerogative with respect to lands conveyed to the States upon admission to the Union. *Compare Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Amici submit that, because of the broad discretion conveyed to Hawaii by the "public use" requirement of § 5(f) of its Act, and the very limited avenue for judicial review Congress provided with respect to claims for breach of trust under that section, namely a "suit by the United States," the court of appeals erred in determining that Congress had not disallowed § 1983 as a remedy when it admitted Hawaii to the Union. *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510, 2517 (1990).

In filing this Brief in support of Hawaii, the Amici States do not suggest that, in Hawaii and elsewhere, proper management of state lands is an unimportant matter. Rather, to the contrary, precisely because such management is critical to the independence of the States, the Amici States submit that such issues as have been

brought to the lower federal courts by respondent ought to be litigated in the state courts and agencies which Hawaii – and all other states – provide.

Accordingly, because this case raises questions that go to the basic structure of relations between the States and the federal courts, and, if not reviewed, threatens to burden Hawaii and perhaps other States with litigation that improperly seeks to intrude on matters left to the States and their own courts and administrative agencies, this Court should grant the writ of certiorari sought by the Hawaii Director of Lands and Natural Resources. Given the relatedness of the issue whether a State's admission act may be enforced pursuant to 42 U.S.C. § 1983 to the issues pending in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), the Court may wish to hold the petition here pending a decision in *Suter v. Artist M.*

REASONS FOR GRANTING THE WRIT

Although the Ninth Circuit's analysis in this case is devoted mainly to deciding whether the District Court properly determined that the beachfront land dredged by the Waikoloa Beach Resort was owned by the State of Hawaii, and thus should not have been certified to the private owners of the Resort, the Court of Appeals' judgment is premised upon at least three fundamental determinations, each of which warrant review and reversal by this Court. In light of the limitations of Article III of, and the Eleventh Amendment to, the Constitution, as well as the doctrines that limit enforcement of federal statutes

via 42 U.S.C. § 1983, the judgment of the Court of Appeals threatens a fundamental restructuring of major doctrines which limit the authority of the federal courts over state land use matters. This Court should accordingly grant the writ to correct the numerous conflicts between the judgment below and this Court's precedents delineating the limits of federal power.

A. Certiorari Should Be Granted to Correct the Court of Appeals' Substantial Expansion of Article III Standing.

Although the issue was not addressed by the parties at the court of appeals stage, the Ninth Circuit understood that it had "a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). In concluding, however, that Respondent "Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions," 921 F.2d at 901 n.2, Pet. App. 7, the Ninth Circuit adopted a theory of Article III standing that has been long rejected.

The Ninth Circuit's standing analysis, as Petitioner demonstrates, *see* Pet. at 18, derives from that court's conclusion in an earlier case, *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986), which had stated, in *dicta*, that a native Hawaiian litigant could meet Article III's requirements even if native Hawaiians "have no right to any trust funds." *Id.* at 630, *cited and quoted in Price v. Akaka*, 915 F.2d 469 (9th Cir.), Pet. App.

44, *cited in turn in Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), Pet. App. 7.

This theory of Article III standing, however, has been rejected by this Court, at least as early as *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). In *Simon*, this Court concluded that plaintiffs who alleged that they were being injured by the Government's wrongful failure to deny tax exemptions to certain private hospitals did not sufficiently allege a "case" or "controversy" with the Government in that the denial of the tax benefits (the requested relief) would not give rise to a sufficient likelihood of redress to the injury actually suffered by the Plaintiffs. In this case, because Hawaii would be free under its Admission Act to deny respondent any benefit from the parcel at issue, it is just as, if not more, speculative to assert that any relief that might lead to striking down the shoreline certification in this case would benefit this particular plaintiff. *See also Whitmore v. Arkansas*, 110 S.Ct. 1717, 1725 (1990); *Allen v. Wright*, 468 U.S. 737, 751, 760-61 (1984). Therefore, in this case where only equitable relief is sought, there is no Article III power.

At the very least, this Court should grant the Petition in light of the Article III analysis of the four-Justice opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), which states:

> [E]ven if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as the taxpayer claims. If respondents prevailed and

> increased revenues from state leases were available, maybe state taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. Whether the association's claims of economic injury would be redressed by a favorable decision made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict. We have much less confidence in concluding that relief is likely to follow from a favorable decision here than we had in cases like *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), where standing was found to be lacking because the probable response of private individuals to explicit tax incentive was judged to be too uncertain to satisfy . . . federal standing requirements.

490 U.S. at 614-15 (quoted at Pet. 18-19).

Amici submit that the views of the four Justices in *ASARCO* correctly define "the proper – and properly limited – role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and the writ should issue to make this clear.

Additionally, as Petitioner points out, this case raises an even further threat to Article III principles. This is so

because for any real relief to issue for Respondent here, it would be necessary for the federal courts to issue a directive to the Hawaii Attorney General, in essence, to prosecute a suit for ejectment against the present occupants of the beachfront.

More than fifteen years ago, this Court specifically rejected the proposition that Article III standings lies for this:

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); *see generally Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (whether to initiate affirmative litigation is a matter "generally committed to an agency's absolute discretion" (citing decisions dating to the *Confiscation Cases*, 7 Wall. 454 (1869))). For this additional reason the Court should grant review in this case.[4]

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[4] Although the fact that further proceedings remain before a final judgment issues is a factor that would counsel denying the writ if there were an opportunity to re-present this threshhold issue to the lower courts, it is apparent that the Ninth

(Continued on following page)

B. Certiorari Should Be Granted to Correct the Court of Appeals' Substantial Erosion of the Eleventh Amendment.

Even if Article III were not a bar to the suit below, the lower court's allowance of continued litigation of "breach of trust" claims is contrary to this Court's elaboration of the limits imposed on federal jurisdiction by the Eleventh Amendment. Although the amendment was apparently not raised as a bar in the Court of Appeals, that fact does not prevent this Court from granting relief to the Hawaii Director. See *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 625-26 (1986) (failure to assert abstention defense in the court of appeals not determinative of issue in this Court, so long as issue was properly preserved in the District Court).

Amici submit that the injunctive and declaratory remedies prayed for by Respondent in this case are exactly the sort of relief of "breach of trust" that this Court previously held was impermissible in *Papasan v. Allain*, 478 U.S. 265 (1978). There, claims that Mississippi

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Circuit is firm in its rejection of the threshold arguments which Petitioner and Amici endorse. *See, e.g., Cammack v. Waihee*, 932 F.2d 765, 770 n.9 (9th Cir. 1991) (citing *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991) (rejecting Justice Kennedy's *ASARCO* views pending clarification from this Court)); *Price v. State of Hawaii*, No. 90-15117 (9th Cir. July 11, 1991) (chastizing Hawaii for seeking to raise threshold matters).

had allegedly misused public trust lands and was obligated, in some fashion, to "make whole" the lost trust corpus, were held barred by the Eleventh Amendment. Particularly where the private parties have been dismissed from this action, the remedies sought in this case "would only affect the State," and therefore are precisely the sort of "one-time restoration" that *Papasan* held was improper under the Eleventh Amendment. Certiorari should thus issue.

Even with *Papasan's* concerns put to one side, the Amici States are fundamentally concerned that the federal courts' entry into the essentially state questions concerning accreted or eroded lands runs afoul of the admonishment in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that state law, qua state law, cannot be the basis for suits against state officials in the federal courts. As this Court held in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), "[u]nder our federal system, property ownership is not governed by general federal law, but rather by the laws of the several States," "unless some other principle of federal law requires a different result." *Id.* at 378. Only recently, this Court has made clear that "the individual States have authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). Amici submit that whether Hawaii's shoreline certification process was correctly carried out is, at most, a state question for the state courts. Certiorari should issue to correct the lower court's intrusion on *Pennhurst*, and principles of sovereign immunity generally which prohibit the trying of the

State's title to land in federal court. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982).

C. Certiorari Should Be Granted to Correct the Court of Appeals' Novel Enforcement of State Admission Acts Through the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Although not elaborated upon in its opinion, the Ninth Circuit's judgment rests additionally upon the proposition that 42 U.S.C. § 1983 grants a right "to enforce the provisions of the trust." *See* Pet. App. at 7 (citing *Price v. Akaka*, No. 89-15169 (9th Cir. Sept. 25, 1990), Pet. App. 46-47). Because this summary conclusion is wrong, review here is additionally counseled.

The Ninth Circuit's holdings that § 5(f) of Hawaii's Admission Act, which, insofar as relevant here, allows trust lands to be put to any "public use," and provides, as the sole stated remedy for a breach of the statute's requirements a "suit by the United States," is enforceable under § 1983 has ignored this Court's teaching regarding the implication of § 1983 remedies for asserted violations of federal statutes. For, in contrast to statutes that provide an "objective benchmark" for testing the State's performance, *cf. Wilder*, 110 S.Ct. at 2522-23, the discretion-conferred by Hawaii's admission act, as a matter of federal law, extends to the limit of Hawaii's constitutional powers. *Compare* § 5(f) of the Hawaii Admission Act, 73 Stat. 4, 6 (1959) ("public use" requirement) *with Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("public use" requirement is "coterminous with the scope

of the sovereign's police powers"). While additional constraints might be posed by state law, "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984). And the fact that Congress provided Hawaii with no ongoing funds to enforce the provisions of the public land trust cuts strongly against a holding that § 1983 provides an enforcement vehicle in this context. *See Wilder*, 110 S.Ct. at 2518 & n.10.

It is also dubious that Congress had any intent but to foreclose private enforcement in the Admission Act itself. It is anomalous to hold otherwise, for, as stressed above, the strong presumption is *against* any sort of reserved federal control over a State's lands conveyed by its admission to the Union. For Congress to be deemed to have allowed § 1983 enforcement, that intention should have been " 'definitely declared or otherwise made very plain.' " *Utah Division of State Lands v. United States*, 482 U.S. 193, 201-02 (1987). In fact, it is simply illogical to deem Congress to have allowed § 1983 suits in this context. Section 1983 could not be enforced when Hawaii's trust lands were administered by the United States. *See Ngirangas v. Sanches*, 110 S.Ct. 1737 (1990). Thus, as Petitioner points out, there was nothing in the way of § 1983 remedies to be "withdrawn" upon Hawaii's admission to the Union. *Cf. Wilder*, 110 S.Ct. at 2524 & n.19.

The fundamental error of the Court of Appeals here was to ignore the precise language, structure, and context, as well as the surrounding presumptions to be applied to the sort of statute sought to be enforced by

way of § 1983. This is, in essence, the sort of error which the States have called to the Court's attention in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991). Although it may be appropriate for the Court to therefore hold this case pending the disposition in *Suter*, this case, even more than the federal mandates imposed by the Adoption Assistance Act, warrants this Court's review as an inappropriate expansion of § 1983's enforcement reach. For this additional reason, the petition should be granted.

CONCLUSION

In urging this Court to grant the petition for certiorari, the Amici States do not diminish the important problems which appear to have animated the Ninth Circuit's efforts to federalize the litigation concerning Hawaii's public trust lands. However, the position of the Amici States is that the dispute in this case, if it belongs in a judicial forum, ought to be heard in the courts of the State of Hawaii.[5] For this reason, and all those others

[5] The Petition (*see* Pet. at 28-30) suggests that the case below ought to have been dismissed pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or stayed pursuant to *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Amici agree that such a prudential course is warranted, providing a ground for mooting the important substantive issues here.

stated above, the Amici States urge the Court to grant the petition for certiorari in this case.

Respectfully submitted, August 23, 1991.

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